

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS ET AL)
)
VS.)
) CIVIL ACTION NO.
UNITED STATES OF AMERICA) 1:18-CV-68
ET AL)

SCHEDULING CONFERENCE HEARING
BEFORE THE HONORABLE ANDREW S. HANEN
MAY 30, 2018

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11:06:46 1 THE COURT: All right. Be seated. We're
11:06:56 2 here in B-18-68, State of Texas et al. versus U.S.
11:07:02 3 et al.

11:07:04 4 Who do I have for the State of Texas?

11:07:06 5 MR. DISHER: Good morning, Your Honor,
11:07:07 6 Todd Disher for the Texas Attorney General's office.
11:07:10 7 With me today, I have Brantley Starr and Adam Biggs.

11:07:13 8 THE COURT: All right.

11:07:14 9 For the United States, Mr. Hu, who is with
11:07:17 10 you?

11:07:18 11 MR. HU: With me today is Brett Shumate from
11:07:21 12 the Deputy Assistant Attorney General. He'll be
11:07:23 13 addressing the merits questions and the other cases.
11:07:26 14 And Jeff Robins from the Office of Immigration
11:07:29 15 Litigation who will address scheduling concerns.

11:07:31 16 THE COURT: Okay.

11:07:32 17 And Ms. Perales, who's with you?

11:07:34 18 MS. PERALES: Good morning, Your Honor,
11:07:35 19 Nina Perales for the Defendant Intervenors. With me are
11:07:38 20 Mr. Jack Salmon and Mr. Carlos Garcia.

11:07:43 21 THE COURT: All right. And representing the
11:07:45 22 great State of New Jersey, we have?

11:07:48 23 MS. WAINER APTER: Rachel Wainer Apter,
11:07:50 24 Your Honor.

11:07:50 25 THE COURT: All right. I love having

11:07:54 1 New Jersey here because that allows me to, you know,
11:07:57 2 repeat the old joke about why does New Jersey have more
11:08:00 3 chemical plants and Texas has more lawyers? Because
11:08:04 4 New Jersey got first choice. You know, works out great.

11:08:10 5 All right. I may be taking things in an
11:08:16 6 order that's a little unorthodox but does anyone have an
11:08:24 7 objection to New Jersey joining the fray?

11:08:28 8 MR. DISHER: The State of Texas does have an
11:08:30 9 objection to that, Your Honor.

11:08:31 10 THE COURT: All right. Let's hear that.
11:08:34 11 Let's hear from you, then, Mr. Disher, if you will.

11:08:36 12 MR. DISHER: Of course. In their motion to
11:08:44 13 intervene, New Jersey has not overcome the presumption
11:08:47 14 of adequate representation.

11:08:49 15 The interests that they represent in this
11:08:51 16 case are represented by the individual DACA recipients
11:08:55 17 who have already intervened.

11:08:57 18 The presumption of adequate representation
11:08:59 19 arises when the would-be Intervenor has the same
11:09:02 20 ultimate objective as the party to this lawsuit.

11:09:04 21 New Jersey has the same ultimate objective
11:09:09 22 as the individual DACA recipients who have already
11:09:12 23 intervened in this case; therefore, those individual
11:09:14 24 DACA recipients represented by counsel already in the
11:09:18 25 case will adequately represent those interests.

11:09:21 1 To overcome the presumption of adequate
11:09:23 2 representation, New Jersey would have to show adversity
11:09:27 3 of interest, collusion, or nonfeasance. And New Jersey
11:09:31 4 has not even attempted to show that, let alone allege
11:09:35 5 that in any way.

11:09:36 6 The only area where they address this in
11:09:39 7 memorandum in support of intervention is about a
11:09:41 8 paragraph in which they describe how their interests may
11:09:45 9 be slightly different than the interests of the DACA
11:09:48 10 recipients who have already intervened, but they do
11:09:51 11 nothing to allege why the intervention of the DACA
11:09:54 12 recipients is not adequate to represent the New --
11:09:59 13 New Jersey's interest or how they have a different goal.

11:10:01 14 They indeed have the same objection --
11:10:04 15 objective and have done nothing to show, again, this
11:10:08 16 adversity of interest, collusion, or nonfeasance on the
11:10:13 17 part of the individual DACA recipients who have already
11:10:13 18 intervened in this case.

11:10:15 19 Therefore, we believe that intervention as a
11:10:17 20 matter of right is not warranted in this case for
11:10:20 21 New Jersey and we do not believe that permissive
11:10:24 22 intervention is necessary in this case as well.

11:10:26 23 Again, their interests will be represented
11:10:28 24 by the individual DACA recipients and the intervention
11:10:32 25 of New Jersey will only lead to additional delay as

11:10:36 1 evidenced by their proposed schedule, which asks for a
11:10:38 2 four month extension of the -- of the deadline for the
11:10:43 3 briefing on our motion for preliminary injunction.

11:10:46 4 So we don't believe that permission --
11:10:48 5 intervention as a matter of right is warranted here and
11:10:50 6 we don't believe that intervention on a permissive basis
11:10:55 7 is warranted here as well.

11:10:56 8 We are happy to file a -- a -- a proposed --
11:10:59 9 or a response in opposition to their motion to intervene
11:11:03 10 and, if it would speed things along, we could do so
11:11:05 11 quickly if that would help the Court.

11:11:07 12 THE COURT: All right. Ms. Perales, do your
11:11:13 13 folks have a position one way or the other?

11:11:15 14 MS. PERALES: Your Honor, we do not oppose
11:11:16 15 the motion.

11:11:17 16 THE COURT: All right. Mr. Hu, what about
11:11:19 17 the Government?

11:11:24 18 MR. HU: Mr. Shumate will address that.

11:11:24 19 MR. SHUMATE: Your Honor, I'm happy to
11:11:26 20 address that. Again, Brett Shumate from the Department
11:11:29 21 of Justice.

11:11:29 22 We would identify an additional reason why
11:11:32 23 New Jersey should not be permitted to intervene is the
11:11:34 24 fact they do not have standing.

11:11:36 25 We did not oppose MALDEF's intervention

11:11:39 1 because we have no objection to the -- we -- we -- we do
11:11:41 2 believe that the individual DACA recipients have
11:11:43 3 standing in this case but the states are differently
11:11:46 4 situated.

11:11:47 5 We opposed California and New York's
11:11:50 6 standing in the DACA recision cases and for the -- for
11:11:52 7 the same reason here, we don't believe New Jersey has
11:11:56 8 standing to challenge and seek the continuation of DACA.

11:11:58 9 So for that additional reason, we don't
11:12:00 10 think New Jersey has a basis to intervene in this case.

11:12:03 11 THE COURT: All right. Ms. Apter, do you
11:12:06 12 want to weigh in?

11:12:10 13 And I'm particularly, as you walk up to the
11:12:13 14 podium, I'm particularly interested in the point
11:12:17 15 Mr. Disher made of why the -- you're not adequately
11:12:20 16 represented by Ms. Perales' group.

11:12:22 17 MS. WAINER APTER: Thank you, Your Honor.
11:12:25 18 In terms of adequate representation by the MALDEF
11:12:30 19 Defendant Intervenors, the Defendant Intervenors do not
11:12:32 20 have the same ultimate objective as New Jersey. The
11:12:35 21 Defendant Intervenors objective is to protect the
11:12:39 22 interests of the individual client DACA recipients who
11:12:41 23 are current DACA grantees.

11:12:44 24 New Jersey's interest in this litigation is
11:12:46 25 about protecting state agencies that have invested

11:12:49 1 resources and hiring and training DACA grantees, state
11:12:52 2 colleges that have invested resources in educating DACA
11:12:56 3 grantees and that benefit from having DACA grantees on
11:12:58 4 campus, the State economy which benefits from having the
11:13:02 5 State and local tax revenue paid by DACA grantees and
11:13:02 6 all of their contributions to the many sectors of the
11:13:07 7 New Jersey economy.

11:13:08 8 So New Jersey has a proprietary interest in
11:13:12 9 this case that is not shared by the MALDEF Defendant
11:13:12 10 Intervenors.

11:13:14 11 New Jersey also has a sovereign interest in
11:13:17 12 enforcing its criminal laws which is impacted by this
11:13:19 13 case where 48 percent of DACA grantees said they would
11:13:23 14 be less likely to go to report -- 53 percent, I'm sorry,
11:13:27 15 said they would be less likely to report a crime they
11:13:29 16 witnessed to the police if DACA were rescinded.

11:13:32 17 THE COURT: Who did they say that to?

11:13:34 18 MS. WAINER APTER: This is the declaration
11:13:36 19 of Tom Wong, which is attached to our motion to
11:13:39 20 intervene as an appendix.

11:13:40 21 THE COURT: How was that information
11:13:41 22 gathered is what I'm asking really?

11:13:43 23 MS. WAINER APTER: So it was a survey of
11:13:45 24 more than 3,000 current DACA grantees across the
11:13:50 25 country. It was online. And Mr. Wong explains in

11:13:53 1 detail the methodology of the survey and exactly how all
11:13:56 2 of the questions were phrased. And he also provides, in
11:13:58 3 addition to the statistics, individual responses from
11:14:02 4 DACA grantees. There was a place where people could
11:14:05 5 enter qualitative responses, not just multiple choice.

11:14:09 6 THE COURT: How does -- how does he -- how
11:14:09 7 did he identify DACA recipients?

11:14:14 8 MS. WAINER APTER: So the survey was pushed
11:14:16 9 out -- and this is explained in the declaration starting
11:14:21 10 at paragraph nine under the methodology. So there were
11:14:25 11 several steps that were taken to get the survey to DACA
11:14:29 12 recipients. Often times through outreach partners,
11:14:36 13 United We Dream, The National Immigration Law Center and
11:14:38 14 The Center for American Progress. Those partners
11:14:40 15 distributed the survey link to e-mails lists and then it
11:14:42 16 was also distributed online. There were multiple
11:14:46 17 actions that were taken to make sure that no one filled
11:14:48 18 out the survey more than once, that everyone who filled
11:14:50 19 out the survey actually was a DACA recipient.

11:14:53 20 THE COURT: How -- I mean, that's what I'm
11:14:55 21 ask -- interested in. Because when -- in the last
11:14:56 22 lawsuit that was here when I even suggested that a list
11:15:00 23 of DACA people filed under seal, I got barraged with
11:15:08 24 amicus's for DACA say, no, the only people that have
11:15:11 25 this information is the Government. And even though I

11:15:12 1 was going to have it kept under seal, you know, people
11:15:16 2 said all this information is unavailable and if you make
11:15:19 3 it available, then -- then it endangers the privacy of
11:15:23 4 the DACA recipients. So I'm wondering how -- if
11:15:28 5 that's -- if that was either not true or how do these
11:15:32 6 groups have lists of DACA recipients?

11:15:35 7 MS. WAINER APTER: So I believe that
11:15:36 8 partners United We Dream, National Immigration Law
11:15:40 9 Center and Center for American Progress have general
11:15:44 10 e-mail lists and they sent the survey out but the way
11:15:46 11 that they were specifically making sure that only DACA
11:15:47 12 recipients were filling out the survey is they repeated
11:15:50 13 several questions during several parts of the survey
11:15:53 14 several times.

11:15:54 15 I'm looking at paragraph 10 of the Wong
11:15:56 16 declaration. So, for example, the question, how old
11:15:58 17 were you when you first came to the United States? In
11:16:01 18 what year did you first come to the United States? That
11:16:03 19 question repeated several times throughout the survey to
11:16:07 20 make sure that no one was filling it out incorrectly.

11:16:10 21 And there was also, you know, steps taken to
11:16:13 22 make sure that no one could fill out the survey more
11:16:15 23 than once.

11:16:16 24 THE COURT: What would keep me from filling
11:16:18 25 that out?

11:16:20 1 MS. WAINER APTER: In viewing --

11:16:20 2 THE COURT: As long as I gave consistent
11:16:22 3 answers.

11:16:23 4 MS. WAINER APTER: So any inconsistencies
11:16:25 5 and the Respondent was -- was excluded. You also
11:16:28 6 probably would not have received the link from United We
11:16:32 7 Dream or The National Immigration Law Center or The
11:16:37 8 Center for American Progress. However, Mr. Wong does
11:16:39 9 explain in paragraph 10 that given -- that it is an
11:16:43 10 online opt-in survey.

11:16:45 11 THE COURT: Okay.

11:16:46 12 MS. WAINER APTER: In terms of New Jersey's
11:16:47 13 interest in this case, I just wanted to take a step back
11:16:51 14 and once again reiterate that we are looking to protect
11:16:54 15 proprietary interests both in state institutions that
11:16:58 16 employ DACA grantees.

11:17:00 17 So, for example, New Jersey's Department of
11:17:03 18 Children and Families, Division of Child Protection and
11:17:07 19 Permanency, employs a DACA grantee right now into its
11:17:11 20 prestigious -- it's called the Baccalaureate Child
11:17:11 21 Welfare Education Program. The State has invested
11:17:16 22 already in Ms. Cynthia Osorio a -- an internship during
11:17:20 23 this past school year and a two year contract following
11:17:22 24 graduation. That investment would never be able to be
11:17:25 25 re-cooped if DACA were terminated.

11:17:28 1 And there are many other state agencies that
11:17:31 2 also have similar stories.

11:17:32 3 And many DACA grantees are also currently
11:17:35 4 employed by New Jersey's public colleges and
11:17:37 5 universities and, so, if DACA were terminated, these
11:17:40 6 public institutions would lose the employees, they would
11:17:44 7 also lose the investment that they have made in hiring,
11:17:46 8 training and retaining them, they would be forced to
11:17:48 9 expend additional money recruiting, hiring and training
11:17:50 10 new employees.

11:17:50 11 THE COURT: Is that -- I mean, they hired
11:17:53 12 them knowing that DACA was revocable. I mean, the DACA
11:17:58 13 memo that creates it says it's revocable and that it
11:18:03 14 confers no substantive right. So how does -- if -- if
11:18:05 15 the recipient doesn't have a substantive right, how does
11:18:09 16 New Jersey have a substantive right?

11:18:11 17 MS. WAINER APTER: So having a substantive
11:18:12 18 right is different than having a proprietary interest
11:18:15 19 that could be affected by the litigation.

11:18:17 20 For purposes of intervention, New Jersey
11:18:19 21 needs to show a proprietary or sovereign interest that
11:18:24 22 could, in theory, be impacted by the litigation.

11:18:26 23 THE COURT: So that would be the standing in
11:18:28 24 response to the Government's argument that you don't
11:18:30 25 have standing?

11:18:32 1 MS. WAINER APTER: Correct. So all
11:18:34 2 New Jersey has to show for purposes of standing or for
11:18:37 3 purposes of the motion to intervene is a proprietary or
11:18:40 4 sovereign, or quasi-sovereign interest even, that could,
11:18:43 5 in theory, be impacted by the intervention.

11:18:46 6 And this is a very minimal showing that is
11:18:48 7 required and New Jersey has --

11:18:49 8 THE COURT: Let -- let me -- let me just ask
11:18:50 9 a general question because obviously I assume you've
11:18:53 10 read all the DACA cases. Everybody in here's read them.

11:18:58 11 I mean, wouldn't a state under this current
11:19:06 12 interpretation, let's say, I mean, a state could --
11:19:10 13 could challenge anything; couldn't they? I mean, how
11:19:14 14 could you -- how could you not have standing to
11:19:15 15 challenge anything given this? I mean, you may or may
11:19:21 16 not know but, I mean, I spent 60 pages trying to figure
11:19:27 17 out if Texas had standing in the last case where
11:19:31 18 everybody else just -- is just saying, hey, you're a
11:19:34 19 state, you got standing.

11:19:35 20 MS. WAINER APTER: So in this case,
11:19:36 21 New Jersey is specifically not relying on Parens patriae
11:19:40 22 standing or any form of general just solicitude to
11:19:44 23 states. New Jersey is specifically raising standing
11:19:47 24 based on proprietary interests and sovereign interests
11:19:50 25 and has provided detailed declarations to explain both

11:19:54 1 of those interests. And both of those are reasons that
11:19:58 2 New Jersey should be granted standing in this case even
11:20:01 3 without looking to the additional solicitude that states
11:20:06 4 may be entitled to.

11:20:07 5 So, for example, under -- as I spoke already
11:20:13 6 about the New Jersey Division of Child Protection and
11:20:16 7 Permanency but there are 2,200 current DACA recipients
11:20:20 8 who are students at New Jersey state colleges. And many
11:20:23 9 of those DACA grantees will be forced to drop out of
11:20:25 10 school without finishing their degree.

11:20:27 11 So the State would lose hundreds of
11:20:29 12 thousands of dollars in tuition revenue if DACA were
11:20:33 13 terminated. And that is an example of a proprietary
11:20:36 14 interest that New Jersey has in this case.

11:20:38 15 It would also lose all of the resources that
11:20:40 16 it has already --

11:20:40 17 THE COURT: Why -- why would they drop out?

11:20:42 18 MS. WAINER APTER: So actually we have a
11:20:43 19 declaration from a DACA grantee who explains she's
11:20:46 20 currently a student at Rutgers. Her name is
11:20:51 21 Daniella Velez. She explains that she will not be able
11:20:53 22 to finish her college degree if DACA is terminated
11:20:55 23 because she will not be able to afford tuition.

11:20:58 24 The declaration of -- we also have a
11:21:01 25 declaration from --

11:21:01 1 THE COURT: Do the DACA recipients get
11:21:03 2 cheaper tuition?

11:21:05 3 MS. WAINER APTER: So DACA recipients
11:21:06 4 currently can get New Jersey in-state tuition.

11:21:10 5 THE COURT: Okay. And she would -- if she
11:21:13 6 wasn't a DACA, even though she lived in New Jersey,
11:21:17 7 she'd get higher tuition?

11:21:19 8 MS. WAINER APTER: Oh, no, the reason,
11:21:22 9 sorry, that she's saying that she would no longer be
11:21:23 10 able to afford her education is because DACA provides
11:21:25 11 her with work authorization. And so she currently works
11:21:28 12 to support herself and to pay her tuition.

11:21:28 13 THE COURT: All right.

11:21:30 14 MS. WAINER APTER: And she would no longer
11:21:31 15 be able to do that if she did not have work
11:21:33 16 authorization.

11:21:33 17 We also have a declaration from Dr. Zakiya
11:21:37 18 Smith Ellis, who is the acting secretary of higher
11:21:39 19 education in New Jersey. And she explains that without
11:21:42 20 the ability to work to support themselves, many DACA
11:21:45 21 students will be forced to drop out of school without
11:21:47 22 finishing their degrees.

11:21:48 23 And, again, that's 2,200 students in the
11:21:52 24 different universities, some public research
11:21:55 25 institutions, some state colleges and some county

11:21:58 1 colleges in New Jersey.

11:21:59 2 THE COURT: Okay.

11:22:00 3 MS. WAINER APTER: And those institutions,
11:22:02 4 I'm sorry, also employ DACA grantees and so those
11:22:05 5 institutions, in addition to losing tuition funds when
11:22:09 6 DACA grantees were forced to drop out of college, would
11:22:12 7 also lose money in that they would have to recruit new
11:22:16 8 employees to step into the roles that are currently
11:22:19 9 being filled by DACA grantees.

11:22:21 10 THE COURT: And I assume if I grant
11:22:24 11 New Jersey intervention, they're willing to abide by
11:22:26 12 whatever scheduling order I enter?

11:22:28 13 MS. WAINER APTER: Yes, correct, Your Honor.

11:22:29 14 THE COURT: All right. Anybody else want to
11:22:31 15 respond to Ms. Apter's --

11:22:33 16 MR. DISHER: Briefly, Your Honor.

11:22:34 17 THE COURT: You can stay there in case you
11:22:35 18 want to --

11:22:37 19 MS. WAINER APTER: Okay. Thank you.

11:22:38 20 THE COURT: -- slap back.

11:22:40 21 MR. DISHER: Your Honor, the Fifth Circuit
11:22:42 22 precedent is clear. The Fifth Circuit recognizes that
11:22:46 23 there is, of course, a cost or a burden of adding
11:22:49 24 additional parties. We will have to depose all of their
11:22:51 25 witnesses as we go forward through the litigation, they

11:22:54 1 will file additional briefing that we will respond to.

11:22:57 2 A additional party can, of course, can come
11:23:00 3 in if that party's interests are not represented by the
11:23:05 4 existing parties in the case but the Fifth Circuit,
11:23:07 5 recognizing the additional burden created by having
11:23:10 6 additional parties, created this presumption of adequate
11:23:13 7 representation when the ultimate objective of the new
11:23:18 8 potential parties is the same as the objective --
11:23:23 9 objective of an existing party.

11:23:25 10 THE COURT: Well, let me ask you this,
11:23:26 11 Mr. Disher, that's the argument I bought in the last
11:23:32 12 case and Judge Elrod made it clear that she wasn't
11:23:37 13 buying it. And -- and she sits on the Fifth Circuit, I
11:23:41 14 don't.

11:23:42 15 MR. DISHER: Your Honor, in -- in the last
11:23:43 16 case, there was a -- a critical distinction and that was
11:23:47 17 the existing Defendants were the Department of Justice
11:23:50 18 who had all sorts of additional interests and
11:23:53 19 representations and objectives that the individual
11:23:57 20 potential DAPA recipients may not have had.

11:24:00 21 In this case, the objective of the
11:24:02 22 individual DACA recipients who are already in this case
11:24:06 23 is to continue DACA in its full force and effect into
11:24:09 24 the future. That is the exact same objective --

11:24:13 25 THE COURT: Wait. Wait. Wait. Wait.

11:24:13 1 Whose objective is that?

11:24:15 2 MR. DISHER: That -- that would be the
11:24:16 3 individual DACA recipients who have intervened. Their
11:24:21 4 objective in this case is to defend DACA and -- and
11:24:23 5 maintain DACA's existence. That is the same object --

11:24:25 6 THE COURT: Well, at least for the 20 or so
11:24:27 7 that have intervened certainly.

11:24:28 8 MR. DISHER: Yes, sir. Yes, Your Honor.
11:24:29 9 That is correct. That is their objective. And that
11:24:31 10 objective is shared by New Jersey.

11:24:34 11 New Jersey is talking about the different
11:24:36 12 interests that they may have, but those interests are
11:24:38 13 protected if DACA continues in existence. That is their
11:24:42 14 objective. So the Fifth Circuit asks not whether you
11:24:46 15 have different interests with existing parties, the
11:24:49 16 Fifth Circuit asks whether you have different
11:24:51 17 objectives.

11:24:51 18 And in this case, New Jersey has the same
11:24:54 19 objective as the individual DACA recipients who are
11:24:58 20 already in this case. And, again, to overcome that
11:25:01 21 presumption, when parties have the same objective,
11:25:04 22 New Jersey has to show adversity of interest, collusion,
11:25:08 23 or nonfeasance on the part of the existing party.
11:25:11 24 New Jersey has not alleged that, let alone shown that.

11:25:14 25 So we again believe that based -- based on

11:25:17 1 well established Fifth Circuit precedent, if the
11:25:20 2 parties, the potential intervening parties have the same
11:25:23 3 objective as an existing party to the case, intervention
11:25:27 4 is not granted as a matter of right.

11:25:31 5 And, again, we are happy to submit briefing
11:25:33 6 on that. Our response date has not come and we can
11:25:35 7 submit that briefing as soon as possible if that would
11:25:37 8 assist Your Honor.

11:25:38 9 THE COURT: All right. Here's -- I want you
11:25:40 10 to give any kind of response brief in a week. So by
11:25:46 11 June 6th.

11:25:52 12 MR. DISHER: Yes, Your Honor.

11:25:53 13 THE COURT: And Ms. Apter, if you want to
11:25:56 14 reply to their response, you have until June 11th.

11:25:59 15 MS. WAINER APTER: Okay. Thank you. Does
11:26:01 16 that mean I should not reply now, Your Honor?

11:26:03 17 THE COURT: No, if you have -- if you want
11:26:05 18 to weigh in on what he just said, you're welcome to do
11:26:08 19 that.

11:26:08 20 MS. WAINER APTER: Just in terms of the
11:26:10 21 ultimate objective, I think as Your Honor recognized,
11:26:13 22 part of it is about what level of generality you're
11:26:15 23 looking at the ultimate objective. But, in theory, in
11:26:18 24 the last DAPA lawsuit, the federal Government had the
11:26:20 25 same ultimate objective as any prospective DAPA grantees

11:26:25 1 and that was to keep the memo and the DAPA program to
11:26:28 2 allow it to go into effect.

11:26:29 3 Here, New Jersey does not have the same
11:26:32 4 ultimate objective as the individual DACA grantees
11:26:34 5 because New Jersey's ultimate objective is to protect
11:26:38 6 its proprietary and sovereign interests. And the DACA
11:26:42 7 grantees simply cannot do that in this case. But I will
11:26:44 8 submit a reply.

11:26:45 9 THE COURT: All right. Thank you.

11:26:46 10 MS. WAINER APTER: Thank you.

11:26:53 11 THE COURT: All right. Ms. Perales, the
11:26:55 12 Intervenors have filed a motion to dismiss. Do you want
11:26:58 13 to address that? Or you, or one of your group, whoever
11:27:02 14 wants to --

11:27:04 15 MS. PERALES: Thank you, Your Honor. And we
11:27:09 16 recognize that obviously the -- the State has not -- the
11:27:14 17 states have not had a chance to respond or possibly even
11:27:20 18 review the entire thing and so I will --

11:27:22 19 THE COURT: Well, I haven't reviewed the
11:27:23 20 entire notebook that was delivered to me about 10
11:27:26 21 minutes ago but --

11:27:26 22 MS. PERALES: Yes, Your Honor.

11:27:27 23 THE COURT: -- but it's the states that want
11:27:29 24 the fastest schedule so I'm putting them on a short
11:27:33 25 leash.

11:27:33 1 So go ahead.

11:27:34 2 MS. PERALES: Thank you, Your Honor. The
11:27:35 3 reason that we filed the motion to dismiss when we did
11:27:38 4 was that it is part of the Court's consideration around
11:27:40 5 scheduling. So it does dovetail --

11:27:43 6 THE COURT: That's why I'm hearing it now.

11:27:45 7 MS. PERALES: -- with the -- with the
11:27:47 8 scheduling issue. It's simply that the Defendant
11:27:49 9 Intervenors have proposed a schedule that includes time
11:27:55 10 to consider motions under Rule 12 as well as the motion
11:27:59 11 that we filed yesterday because there are important
11:28:02 12 questions about whether the case should go forward here.

11:28:07 13 There is a Northern District of California
11:28:10 14 case that has taken up questions that substantially
11:28:15 15 overlap with the questions that are raised in this case
11:28:19 16 and that has also resulted in an injunction preserving
11:28:24 17 at least DACA renewals which is now -- that injunction
11:28:29 18 is pending before the Ninth Circuit.

11:28:33 19 Judge Alsup in the Northern District of
11:28:37 20 California has ruled that DACA is lawful, so that case
11:28:41 21 does involve some of the same core issues as this case.
11:28:45 22 There is both a -- a substantive APA aspect to this, as
11:28:51 23 well as a procedural APA aspect to Judge Alsup's ruling.

11:28:56 24 THE COURT: Of course he's not bound by the
11:28:58 25 Fifth Circuit and I am.

11:29:00 1 MS. PERALES: Yes, Your Honor. And that's
11:29:02 2 why we believe that in the interest of comity and sound
11:29:06 3 judicial administration, that this Court should exercise
11:29:10 4 one of three options; either dismiss the case, transfer
11:29:14 5 the case, or stay proceedings in this case pending the
11:29:17 6 outcome of the rulings in --

11:29:21 7 THE COURT: Was a motion filed in his court
11:29:23 8 similar to this?

11:29:24 9 MS. PERALES: No, Your Honor, it was not.

11:29:25 10 THE COURT: Okay. Because I had the first
11:29:28 11 case.

11:29:29 12 MS. PERALES: Your Honor, the --

11:29:29 13 THE COURT: I --

11:29:30 14 MS. PERALES: -- Plaintiffs -- I'm sorry.

11:29:31 15 THE COURT: Hold on.

11:29:32 16 MS. PERALES: I'm sorry, Your Honor.

11:29:34 17 THE COURT: The stipulation of voluntary
11:29:37 18 dismissal, which Texas signed, which the United States
11:29:39 19 signed, in which you signed, was based on rescinding
11:29:45 20 the -- the DACA program. I mean, I'm holding it right
11:29:50 21 here. And it's all about that case being dismissed
11:29:57 22 based on that fact. And, now, that's not happening. So
11:30:04 23 don't I have a breach of my settlement agreement or a
11:30:07 24 breach of -- of -- or lack of consideration given for
11:30:10 25 the dismissal of that case?

11:30:12 1 MS. PERALES: No, Your Honor, because Texas
11:30:14 2 and the other Plaintiffs in the DAPA case very clearly
11:30:19 3 represented to the Court that they were not challenging
11:30:22 4 the legality of 2012 DACA.

11:30:26 5 THE COURT: They joined the -- as a matter
11:30:28 6 of fact, that's what the Justice Department lied to me
11:30:30 7 about, 108,000 DACA renewals.

11:30:37 8 MS. PERALES: Plaintiffs --

11:30:38 9 THE COURT: I mean, we had hearing, after
11:30:39 10 hearing, after hearing. In fact, you were --
11:30:41 11 participated in a lot of those.

11:30:43 12 MS. PERALES: Yes, Your Honor. And the --
11:30:46 13 the initiative that was challenged in what we call the
11:30:50 14 DAPA case was the 2014 expansion of DACA. And the
11:30:57 15 Plaintiffs in that case made clear a number of times
11:31:00 16 before this Court and also in their legal papers that
11:31:03 17 they were not challenging 2012 DACA. And they made a
11:31:07 18 very strong distinction between that.

11:31:09 19 And then they talked about possibly amending
11:31:11 20 their complaint to challenge 2012 DACA. And,
11:31:15 21 ultimately, in the course of the case, the Plaintiffs
11:31:18 22 did not amend their complaint to challenge.

11:31:21 23 THE COURT: But wasn't it -- but -- but
11:31:21 24 because they were given assurances that DACA was going
11:31:25 25 away. I mean, I'm -- on September 5th, 2017, the

11:31:32 1 Department released a memorandum entitled Rescission of
11:31:35 2 the June 15th, 2012 Memo. "Given this" -- and I'm
11:31:39 3 skipping a part here -- "given this
11:31:42 4 memorandum rescinding the DAPA program and phasing out
11:31:45 5 DACA and expanded DACA, Plaintiffs have filed this
11:31:48 6 dismissal." And all the parties agreed to that based on
11:31:50 7 that representation. Don't I have a breach?

11:31:53 8 MS. PERALES: No, Your Honor, you do not.
11:31:55 9 And in part because after the lawsuits were filed
11:32:01 10 challenging the rescission memo, Texas and the other
11:32:06 11 Plaintiffs still went ahead and dismissed their case.
11:32:09 12 So the California case was filed before the DAPA case
11:32:13 13 was dismissed in this court.

11:32:14 14 And then Texas and the other Plaintiffs did
11:32:17 15 not file a challenge to DACA. They waited more than
11:32:21 16 eight months and more than five months after Judge Alsup
11:32:25 17 issued his preliminary injunction.

11:32:28 18 There is -- I mean, at this point,
11:32:32 19 Your Honor, it is the California case that is sitting in
11:32:35 20 the position of the first filed case.

11:32:38 21 THE COURT: Well, why did the case in
11:32:40 22 Washington and the case in Maryland go forward?

11:32:43 23 MS. PERALES: Those cases were filed and
11:32:46 24 have gone forward without a motion from the Department
11:32:50 25 of Justice to stay or dismiss or transfer, which the

11:32:54 1 Department of Justice could have done.

11:32:55 2 THE COURT: Okay. Well, I don't have one of
11:32:57 3 those here.

11:32:57 4 MS. PERALES: Well, Your Honor, we filed one
11:32:59 5 now.

11:33:02 6 THE COURT: Okay.

11:33:03 7 MS. PERALES: The other -- the other thing
11:33:05 8 besides substantial overlap is the question of the
11:33:08 9 jurisdiction of the Northern District of California.
11:33:11 10 There is now an injunction, it's pending before the
11:33:13 11 Ninth Circuit. So putting aside the question of
11:33:16 12 substantial overlap, there is also the question of the
11:33:19 13 existing injunction and the concerns that if this Court
11:33:23 14 goes forward on a request for an injunction that is the
11:33:27 15 complete opposite of the injunction that we have right
11:33:30 16 now, it will cause confusion and disrupt the integrity
11:33:36 17 of the proceedings in the Northern District of
11:33:38 18 California.

11:33:38 19 THE COURT: Well, if you -- if you will
11:33:40 20 read, and there's probably 10 law review articles in the
11:33:46 21 last year and a half over national injunctions, one of
11:33:49 22 the criticisms they have about national injunctions is
11:33:52 23 that the authors of those articles want conflicting
11:33:58 24 rulings so that the Supreme Court will take up the
11:34:00 25 decision and decide it.

11:34:04 1 Now, that's assuming what I would rule would
11:34:06 2 conflict, which it may or may not.

11:34:08 3 MS. PERALES: It may or may not, Your Honor,
11:34:10 4 but it does -- hearing this request for what is very
11:34:15 5 clearly the opposite type of injunction from what we
11:34:18 6 have is very disruptive to the jurisdiction of the
11:34:21 7 Northern District of California.

11:34:22 8 And with respect to national injunctions,
11:34:25 9 Your Honor, Your Honor is one of the few judges in the
11:34:27 10 country who's been in that position and had to make
11:34:29 11 those considerations and chose to issue a national
11:34:32 12 injunction. So it does happen and it can be
11:34:36 13 appropriate.

11:34:37 14 What we have at the moment is a national
11:34:40 15 injunction from the Northern District of California that
11:34:44 16 is pending on appeal in which the Supreme Court has
11:34:48 17 decided not to intervene in.

11:34:51 18 Texas is -- is well aware of all of those
11:34:54 19 things because it filed an amicus brief in the U.S.
11:34:57 20 Supreme Court arguing the very same things on the merits
11:35:00 21 of the legality of DACA that it is arguing here. That
11:35:05 22 only demonstrates that these cases are very -- very
11:35:08 23 intertwined in terms of the merits questions.

11:35:11 24 And that, in this situation, the appropriate
11:35:14 25 first filed court is the Northern District of

11:35:17 1 California.

11:35:17 2 THE COURT: All right. I'm -- I'm going to
11:35:19 3 deny the motion to dismiss on that basis but I'm denying
11:35:23 4 it without prejudice to allow you to bring it back up if
11:35:26 5 it later proves to be -- to be a problem because I think
11:35:34 6 mine was the first court that had this issue. The
11:35:38 7 case -- the 2014 case was dismissed based on this. The
11:35:43 8 parties all agreed to it and signed it based on this.
11:35:48 9 And mine involved an injunction, a nationwide injunction
11:35:54 10 involving DACA. So I'm -- I'm denying it but I'm giving
11:35:58 11 you leave right now to bring it up again at a later time
11:36:03 12 should it prove important.

11:36:05 13 MS. PERALES: Thank you, Your Honor.

11:36:08 14 THE COURT: All right. Let's talk schedule.
11:36:14 15 Texas obviously wants this fast-paced schedule and I --
11:36:22 16 I'm assuming it's driven by the Washington, D.C. order.
11:36:33 17 The Intervenor's want to do some discovery.
11:36:41 18 And I guess, Ms. Perales, talk to me about discovery and
11:36:52 19 why you need it to decide a legal issue.

11:36:58 20 MS. PERALES: Thank you, Your Honor. There
11:36:59 21 are a number of fact issues that are very important to
11:37:02 22 resolve before deciding whether or not to issue the
11:37:05 23 preliminary injunction and the proposed period of
11:37:09 24 limited discovery provides for that.

11:37:11 25 Some of the facts that the Court needs to

11:37:15 1 resolve before issuing the preliminary injunction
11:37:18 2 include standing, also the injury to Plaintiffs, which
11:37:24 3 is part of standing and is also part of other factors
11:37:27 4 under the preliminary injunction, and then finally the
11:37:30 5 equitable factors under the preliminary injunction.

11:37:33 6 With respect to injury, the Plaintiffs have
11:37:37 7 submitted several affidavits which purport to be expert
11:37:43 8 opinions. The Defendant Intervenors need the
11:37:48 9 opportunity to explore those opinions as the Court was
11:37:51 10 just a few minutes ago with the State of New Jersey
11:37:54 11 exploring those opinions and their bases and their
11:37:57 12 conclusions in order to be able to address this question
11:38:00 13 of injury facing the Plaintiff states and specifically
11:38:04 14 Texas.

11:38:05 15 Also, another key issue that is part of
11:38:09 16 considering whether or not to issue a preliminary
11:38:12 17 injunction is the current implementation of DACA, which
11:38:17 18 has changed under the current administration. We do
11:38:22 19 know, based on recent reports about DACA applications
11:38:28 20 and acceptances, that the rate of DACA grants has gone
11:38:33 21 down as a percentage of applications that have been
11:38:37 22 accepted.

11:38:37 23 THE COURT: Wait. Wait. Wait. And -- and
11:38:39 24 I'm not arguing or fussing with you here, are you saying
11:38:41 25 the rate of acceptances have gone down or the rate of

11:38:45 1 applications has gone down? Or both?

11:38:46 2 MS. PERALES: The rate of acceptances has
11:38:48 3 gone down --

11:38:49 4 THE COURT: All right.

11:38:50 5 MS. PERALES: -- Your Honor.

11:38:50 6 THE COURT: Now, could that be due to the
11:38:51 7 fact that they're actually doing interviews and looking
11:38:55 8 at backgrounds and making sure that everybody's
11:38:59 9 eligible?

11:38:59 10 MS. PERALES: It could very well be,
11:39:01 11 Your Honor, that there is an exercise of discretion that
11:39:03 12 is occurring since January of 2017 that was not
11:39:06 13 occurring previously. And this data is now newly
11:39:10 14 available and we believe it's important to bring out the
11:39:12 15 facts around the current implementation of DACA because
11:39:16 16 it goes to some of the issues that lie at the heart of
11:39:21 17 the preliminary injunction.

11:39:21 18 And so that is why the Defendant Intervenor
11:39:23 19 have proposed limited discovery, no more than 10
11:39:26 20 depositions, five of the current declarants. And we
11:39:31 21 would -- we don't want to hide anything here,
11:39:33 22 Your Honor, we would probably want to take a couple of
11:39:36 23 depositions of federal representatives in order to
11:39:41 24 explore the facts around the implementation of DACA.

11:39:44 25 Can -- if I could, Your Honor, address the

11:39:46 1 question of urgency? Texas and the other Plaintiffs
11:39:50 2 have suggested a very fast schedule because of this date
11:39:55 3 that they've identified of July 23rd. But July 23rd is
11:39:59 4 not a date on which Texas and the other Plaintiff states
11:40:02 5 will be injured because the Department of Justice is
11:40:06 6 considering, as Judge Bates has allowed them to do,
11:40:10 7 issuing a new memo rescinding DACA.

11:40:14 8 And the Department of Justice in the
11:40:15 9 Ninth Circuit argument in the Northern District of
11:40:19 10 California case stated, on the same day that we had our
11:40:22 11 original conference with the Court, that they were
11:40:24 12 considering responding to the stay of vacatur by issuing
11:40:29 13 a new memo regarding the rescission of DACA.

11:40:33 14 Second, DOJ has represented that it is
11:40:36 15 considering other options, which is apparent to all,
11:40:40 16 include appealing.

11:40:41 17 THE COURT: What would happen if DOJ just
11:40:44 18 came out and said, or DHS, whomever, I guess it's kind
11:40:48 19 of both because the DHS is the one that does it but they
11:40:52 20 relied on the Attorney General's letter, that we just
11:40:59 21 think DACA's bad policy, it encourages illegal
11:41:03 22 immigration, you know, whatever reason they give,
11:41:07 23 wouldn't that have worked?

11:41:08 24 MS. PERALES: It would certainly restart the
11:41:10 25 clock in front of Judge Bates, in our perspective.

11:41:12 1 Obviously, we're not involved in -- in those cases,
11:41:14 2 we're not involved in the D.C. case.

11:41:16 3 But what Judge Bates has said is he's going
11:41:19 4 to postpone his injunction because he is waiting to see
11:41:22 5 what DOJ might issue.

11:41:24 6 THE COURT: All right. Let me -- let me
11:41:26 7 stop you right there.

11:41:26 8 Mr. Disher -- and I'll let the United States
11:41:30 9 weigh in, in a minute -- but, you know, what was
11:41:36 10 emergent, and I'll use that word advisory, but what was
11:41:44 11 emergent about DAPA when it was in front of this Court
11:41:47 12 was it was about to be implemented and it was going to
11:41:51 13 change the status quo.

11:41:52 14 What is emergent about this situation?

11:41:55 15 MR. DISHER: Yes, Your Honor.

11:41:56 16 THE COURT: Because right now DACA is the
11:41:58 17 status quo.

11:41:59 18 MR. DISHER: Yes, Your Honor. Thank you.

11:42:01 19 So, first of all, a couple points on that. First of
11:42:05 20 all, the two injunctions, one from California and one
11:42:08 21 from New York, mandate -- they issued mandatory
11:42:13 22 injunctions requiring DHS to continue to accept DACA
11:42:17 23 renewal applications. So that is one factor that played
11:42:21 24 into the emergency.

11:42:22 25 And then the second factor, and more

11:42:24 1 significantly, is that the Court in the District of
11:42:28 2 Columbia issued a complete vacatur of the DACA
11:42:32 3 rescission.

11:42:32 4 It, of course, stayed the effect of that
11:42:35 5 vacatur to July 23rd, 2018. But what we know is, as we
11:42:41 6 sit here today, the facts on the ground are such that in
11:42:44 7 54 days DHS is going to continue to accept new DACA
11:42:49 8 applications and going to accept new applications for
11:42:53 9 advanced parole.

11:42:55 10 That means, in 54 days, hundreds of
11:42:58 11 thousands of new people will now be eligible to receive
11:43:01 12 DACA status who did not in the past and, in 54 days,
11:43:07 13 those who have already received DACA status will be
11:43:11 14 eligible to apply for advanced parole.

11:43:13 15 Advanced parole, as we now know, has in fact
11:43:17 16 created a pathway to citizenship for some DACA
11:43:20 17 recipients who otherwise would not have that option. So
11:43:24 18 we know, as we sit here today, we don't know what DHS is
11:43:27 19 going to do, we don't know how the District Court in
11:43:30 20 D.C. is going to react to what -- whatever DHS does, but
11:43:34 21 what we know is that, as we sit here today, the facts on
11:43:37 22 the ground are such that, in 54 days, DHS will accept
11:43:41 23 new DACA applications and new applications for advanced
11:43:44 24 parole. That is why we have asked for this preliminary
11:43:47 25 injunction to be finalized by July 23rd.

11:43:51 1 And acknowledging that all parties may want
11:43:54 2 to seek potential appellate avenues depending on how
11:43:58 3 this Court rules, we've respectfully requested a ruling
11:44:01 4 from this Court by the end of June to allow the 23 days
11:44:04 5 in July for all parties to have the potential or
11:44:08 6 possibility to seek expedited appellate stay
11:44:11 7 proceedings.

11:44:12 8 THE COURT: All right.

11:44:17 9 MS. PERALES: Your Honor, may I add, and
11:44:18 10 this is something that is in our -- in our filing as
11:44:21 11 well? Besides the fact that it is more likely than not
11:44:24 12 that the Department of Justice will reissue a DACA memo
11:44:29 13 or seek a stay of the vacatur or take an appeal, all of
11:44:35 14 those things are more likely than anything going into
11:44:38 15 effect in 53 days with respect to new applications, it
11:44:41 16 is also true that when an application is sent, the
11:44:44 17 current processing times are upwards of five months.

11:44:47 18 And so July 23rd is not a magic date and, in
11:44:51 19 fact, even if, as the State of Texas predicts, somehow
11:44:56 20 the Department of Homeland Security refuses to do
11:44:59 21 anything in the Washington, D.C. case, it would still be
11:45:03 22 at least another five months that the Court has
11:45:06 23 available to it to make a decision on the preliminary
11:45:09 24 injunction.

11:45:10 25 THE COURT: All right. Here's what I'm

11:45:11 1 going to do. Well, first of all, I want to hear from
11:45:14 2 the Government.

11:45:19 3 MR. SHUMATE: Thank you, Your Honor.

11:45:22 4 In April, the D.C. District Court issued an
11:45:25 5 order vacating the rescission of DACA that the DHS had
11:45:29 6 issued in September of 2017 but stayed that order for 90
11:45:32 7 days to give DHS an opportunity to consider whether to
11:45:37 8 provide additional explanation about DACA's legality.

11:45:38 9 As my colleagues have represented that DHS
11:45:41 10 is still actively considering its options in response to
11:45:44 11 that order but I'm not prepared to give any assurances
11:45:47 12 or make any representations about how the department
11:45:49 13 will answer that order from the D.C. court.

11:45:51 14 But there's another point I'd like to make
11:45:55 15 on -- on the scheduling issue, Your Honor, which is that
11:45:57 16 the Ninth Circuit case involving DACA's recision was
11:46:00 17 argued on May 15th. That case previously been at the
11:46:03 18 Supreme Court and the Supreme Court instructed the
11:46:06 19 Ninth Circuit to move expeditiously.

11:46:07 20 We expect the Ninth Circuit to issue a
11:46:09 21 ruling in that case in June and that case will quickly
11:46:11 22 be at the Supreme Court likely by the end of the summer.
11:46:15 23 I think all the parties in the Supreme Court would
11:46:17 24 appreciate knowing this Court's tentative views about
11:46:19 25 the outcome of this case since the legality of DACA

11:46:22 1 is -- has been at issue in the Ninth Circuit case as
11:46:25 2 well.

11:46:25 3 So that is another factor the Court should
11:46:28 4 consider in setting -- setting a schedule.

11:46:29 5 THE COURT: Okay.

11:46:31 6 MR. DISHER: Your Honor -- go ahead.

11:46:32 7 MR. SHUMATE: And -- and I would like to
11:46:33 8 address the discovery issues at some point, Your Honor,
11:46:35 9 but I'll --

11:46:36 10 THE COURT: Go ahead. Go -- do it now.

11:46:38 11 MR. SHUMATE: Sure. Thank you, Your Honor.
11:46:39 12 We -- we take no view on discovery of the Plaintiffs but
11:46:42 13 as to discovery of the federal Defendants, we strongly
11:46:45 14 oppose that for a couple of reasons, Your Honor.

11:46:47 15 First, we don't think it's necessary because
11:46:49 16 the Fifth Circuit had ruled that DAPA and expanded DACA
11:46:52 17 are substantively unlawful. That is a purely legal
11:46:56 18 question and in the Attorney General's view, DACA
11:46:58 19 suffers from the same legal defects as DAPA and expanded
11:47:02 20 DACA. There is no discovery that is necessary to answer
11:47:05 21 that purely legal question.

11:47:06 22 Second, the Court made extensive factual
11:47:10 23 findings in the previous case about how DACA had been
11:47:12 24 implemented and that record can be used as a record for
11:47:15 25 appellate review in this case and for the Court to

11:47:17 1 decide the legality of DACA.

11:47:19 2 And, third, I would just point out there's a
11:47:21 3 footnote in the recision memo that DHS issued in
11:47:25 4 September of 2017 that says "significantly, while the
11:47:30 5 DACA denial notice indicates that the decision to deny
11:47:33 6 is made in the unreviewable discretion of USCIS, USCIS
11:47:37 7 has not been able to identify specific denial cases
11:47:40 8 where an applicant appeared to satisfy the programmatic
11:47:43 9 categorical criteria as outlined in the June 15, 2012
11:47:47 10 memorandum, but still had his or her application denied
11:47:50 11 based solely upon discretion".

11:47:52 12 So as of September 5th of 2017, DHS had made
11:47:57 13 that finding that they couldn't find any DACA denials
11:48:00 14 that were denied based on discretion.

11:48:06 15 So for those reasons, Your Honor, we
11:48:07 16 strongly oppose any discovery of the federal Defendants
11:48:10 17 in this case and don't think it's in any way necessary
11:48:12 18 to adjudicate the PI motion or on the merits.

11:48:16 19 Thank you, Your Honor.

11:48:16 20 MR. DISHER: Your Honor, may I address the
11:48:18 21 discovery briefly?

11:48:20 22 THE COURT: Go ahead.

11:48:21 23 MR. DISHER: First thing to point out is
11:48:28 24 that on May 8th before the DACA Intervenors were in this
11:48:33 25 case, in fact when they were asking the Court to allow

11:48:36 1 them into the case, they said "we do not intend to
11:48:40 2 request any modification to the current briefing
11:48:43 3 schedule for the motion for a preliminary injunction.
11:48:46 4 An intervention, therefore, proposes no potential to
11:48:50 5 prejudice the rights of any current party".

11:48:52 6 The current briefing schedule at that point
11:48:55 7 would have had their response due on May 23rd. Their
11:49:00 8 very next act after they were granted permission to
11:49:03 9 enter this case is to ask for a four month delay on
11:49:06 10 their response date for our motion for preliminary
11:49:09 11 injunction.

11:49:10 12 Nothing changed in those 17 days be -- when
11:49:14 13 it -- when the Intervenor made that representation to
11:49:17 14 the Court and when they asked for their four month delay
11:49:19 15 other than the fact that they were allowed into this
11:49:21 16 case.

11:49:22 17 Now, without filing a Rule 26(f) motion,
11:49:25 18 they want expedited discovery in this case to dispute
11:49:29 19 factual findings that this Court has already made and
11:49:32 20 that have been affirmed by the Fifth Circuit. They
11:49:34 21 never say which facts they actually dispute. And, of
11:49:37 22 course, they are allowed to file competing declarations
11:49:41 23 in their response to our motion for preliminary
11:49:44 24 injunction if they in fact do dispute some of these
11:49:47 25 facts.

11:49:48 1 And as the Department of Justice noted,
11:49:52 2 those factual findings have indeed only become stronger
11:49:55 3 since the Fifth Circuit affirmed the preliminary
11:49:59 4 injunction in this case. Again, footnote one of the
11:50:01 5 DACA recision memo itself acknowledges that USCIS cannot
11:50:06 6 find a single case of discretionary denial under the
11:50:10 7 DACA program.

11:50:11 8 We now know that advanced parole is in fact
11:50:14 9 a pathway to citizenship for some DACA recipients that
11:50:18 10 did not have a pathway but for DACA.

11:50:20 11 We know that the Fifth Circuit has said
11:50:23 12 standing is not an accounting exercise, you simply look
11:50:26 13 at costs and not attendant benefits, whatever those may
11:50:31 14 be.

11:50:31 15 What the DACA Intervenors are seeking to do
11:50:34 16 is turn this into a full-fledged litigation culminating
11:50:38 17 in a final -- final judgment after a trial on the
11:50:42 18 merits. There certainly will be time for that but if
11:50:45 19 discovery is allowed on the states, the states, of
11:50:47 20 course, will need discovery on the DACA Intervenors.
11:50:51 21 And all of that will take time and that will happen in
11:50:54 22 due time and we are happy to do that on an expedited
11:50:57 23 basis, but we do not believe that that can occur before
11:51:00 24 the July 23rd deadline in which DACA comes back into
11:51:03 25 full force and effect.

11:51:05 1 So we don't believe at this point, like
11:51:07 2 Your Honor said these are largely legal issues and the
11:51:11 3 DACA Intervenor can, of course, file a response and
11:51:15 4 attach competing declarations all they want, but, at
11:51:19 5 this point, we do not believe that discovery is needed.

11:51:24 6 MS. PERALES: Three short points in
11:51:26 7 response, Your Honor?

11:51:27 8 THE COURT: Go ahead.

11:51:28 9 MS. PERALES: Very short. First of all,
11:51:30 10 with respect to the prior proceeding before this Court,
11:51:33 11 Defendant Intervenor were not participants in -- in the
11:51:37 12 case and didn't have an opportunity to request discovery
11:51:41 13 or explore the underpinnings of some of the factual
11:51:45 14 assertions that were made by Texas.

11:51:47 15 Second, in -- in the past proceeding, Texas
11:51:52 16 largely based its allegations of harm on issues related
11:51:56 17 to drivers' licenses. The Court will note that in the
11:51:59 18 preliminary injunction motion, there is no argument
11:52:01 19 regarding injury or harm related to drivers' licenses
11:52:06 20 but, instead, health care, law enforcement and
11:52:11 21 education.

11:52:11 22 And it is important for this Court to
11:52:14 23 explore the facts related to both injury and the current
11:52:19 24 implementation of DACA, not the past implementation but
11:52:22 25 the current implementation of DACA, for its ruling on

11:52:26 1 the preliminary injunction motion.

11:52:28 2 Defendant Intervenor believe it is too
11:52:31 3 early in this case for accusations of malfeasance and
11:52:34 4 only want to point out to the Court that in our May 15
11:52:37 5 hearing, Defendant Intervenor merely asked a question
11:52:40 6 of the Court which was whether or not local
11:52:45 7 rules/deadlines applied with respect to this preliminary
11:52:48 8 injunction motion. And the Court on its own stated that
11:52:51 9 those local rules did not apply and that the Court
11:52:54 10 planned to set a -- a schedule for the consideration of
11:52:58 11 the preliminary injunction motion.

11:53:00 12 THE COURT: We don't have local rules that
11:53:01 13 control preliminary injunctions.

11:53:03 14 MS. PERALES: Thank you, Your Honor. And
11:53:05 15 we're simply following the Court's guidance as it was
11:53:08 16 given on May 15th. Thank you.

11:53:10 17 MR. DISHER: May I make one --

11:53:11 18 THE COURT: No. No. No. No. Here's --
11:53:12 19 here's what I'm going to do. I want any response by
11:53:21 20 anybody to the request for injunction to be filed by
11:53:27 21 June 8th.

11:53:31 22 And Ms. Apter, if New Jersey joins us after
11:53:34 23 that, I'll give you a different deadline.

11:53:39 24 MS. WAINER APTER: Okay. So does that mean
11:53:42 25 New Jersey should not file any amicus papers on June

11:53:46 1 8th?

11:53:46 2 THE COURT: You're welcome to weigh in but
11:53:49 3 I'm just -- I'm just -- I'm not barring you because I
11:53:51 4 may not have ruled by June 8th on whether you're in or
11:53:55 5 out.

11:53:55 6 I'm allowing discovery up to June 29th. And
11:54:08 7 if that proves to be a problem, then the parties -- you
11:54:11 8 can come to me and let me know.

11:54:14 9 Now, Mr. Disher, you're the one that's in a
11:54:18 10 big hurry in this case so I expect you to cooperate with
11:54:22 11 the Intervenor in getting that discovery done to the
11:54:25 12 extent it's your guys.

11:54:27 13 MR. DISHER: Of course, Your Honor.

11:54:29 14 MS. PERALES: Your Honor, if I could ask for
11:54:31 15 clarification? The Court would like responses to the
11:54:33 16 preliminary injunction motion on July 8 or June 8?

11:54:37 17 THE COURT: June 8th.

11:54:38 18 MS. PERALES: June 8th.

11:54:39 19 THE COURT: Now, I -- I'm assuming what I'm
11:54:41 20 going to get from you is we're against it. And then,
11:54:45 21 later on, you're going to brief why you're against it.

11:54:50 22 MR. SHUMATE: Your Honor, if I may? The
11:54:51 23 federal Defendants would ask the Court to enter an order
11:54:54 24 pre -- precluding any discovery of the federal
11:54:58 25 Defendants and make clear that any discovery would --

11:55:00 1 should only be directed to the Plaintiffs.

11:55:01 2 THE COURT: Well, I -- and I'll -- if --
11:55:03 3 if -- if they have a reason to do discovery, they can
11:55:05 4 apply to me for it.

11:55:07 5 MR. SHUMATE: Okay. Thank you, Your Honor.

11:55:08 6 MR. DISHER: And, Your Honor, does that same
11:55:09 7 application apply to the Plaintiff states as well?

11:55:13 8 THE COURT: No.

11:55:14 9 MR. DISHER: Okay.

11:55:16 10 THE COURT: I want any preliminary briefing
11:55:26 11 as in here's why you shouldn't do it, shouldn't do it by
11:55:33 12 July 7th and any response to those by July 13th. And
11:55:39 13 I'm setting a hearing at 11:00 on July 17th.

11:55:45 14 Now, I don't want to give the impression
11:55:51 15 either way that I'm going to rule by July 23rd. Now, it
11:56:00 16 was clear in the last case among all the parties and
11:56:04 17 understood that the Court was -- had asked and everybody
11:56:08 18 agreed that I should rule before the roll out -- did I
11:56:15 19 say June 17th? I -- I meant July 17th, I'm sorry, at
11:56:18 20 11:00.

11:56:21 21 MR. SHUMATE: I'm -- I'm sorry, Your Honor,
11:56:22 22 I'm -- I'm confused about the schedule. What -- there's
11:56:25 23 a deadline June 8th to respond to the PI motions. What
11:56:28 24 is the July 7th deadline?

11:56:30 25 THE COURT: Well, I -- I'm assuming that,

11:56:32 1 after discovery's taken, some people are going to file
11:56:36 2 briefs saying here's why our position's right or here's
11:56:40 3 why their position's wrong and then I'm letting
11:56:44 4 everybody respond to it by the 13th of July. And then
11:56:51 5 I'm going to hold a hearing on July 17th at 11:00.

11:56:56 6 MR. ROBINS: Your Honor, I think there's
11:56:58 7 just a confusion among all the parties. The -- the
11:57:00 8 briefing beginning on July 7th, is that with regard to
11:57:05 9 the parties' views on the preliminary injunction --

11:57:05 10 THE COURT: Correct.

11:57:07 11 MR. ROBINS: -- following discovery?

11:57:08 12 THE COURT: No, not -- well, not involving
11:57:11 13 discovery but on --

11:57:11 14 MR. ROBINS: No, following, following
11:57:12 15 discovery.

11:57:13 16 THE COURT: -- on the whole shebang. Should
11:57:15 17 there be an injunction, should there not be an
11:57:18 18 injunction.

11:57:18 19 MR. ROBINS: Is the Court aware I believe
11:57:20 20 July 7th is a Saturday?

11:57:24 21 THE COURT: Well, I mean, you could -- it's
11:57:26 22 the deadline for filing, though, I mean, we have
11:57:28 23 electronic filing.

11:57:30 24 MR. ROBINS: Okay.

11:57:32 25 MS. PERALES: Your Honor, may I ask whether

11:57:34 1 the hearing on July 17 at 11:00 a.m. is contemplated as
11:57:39 2 an evidentiary hearing or oral argument only?

11:57:41 3 THE COURT: No. No. I'm not contemplating
11:57:43 4 it as an evidentiary. I figure you're going to give me
11:57:45 5 deposition excerpts, affidavits, whatever, when you file
11:57:49 6 your responses on July 7th.

11:57:50 7 MS. PERALES: Thank you, Your Honor.

11:57:55 8 MR. DISHER: Your Honor, we would just ask,
11:58:00 9 and I'm not sure the best way to go about this, but, of
11:58:05 10 course, we have now filed our declarations from our
11:58:09 11 witnesses, so, presumably, those would be some of the
11:58:12 12 people that the Intervenorers seek discovery on. But we
11:58:16 13 would similarly like the opportunity to seek discovery
11:58:19 14 on the DACA Intervenorers who have filed declarations in
11:58:24 15 support of their motion to --

11:58:25 16 THE COURT: And you've got the same right.

11:58:26 17 MR. DISHER: Okay. Thank you, Your Honor.

11:58:28 18 And then also my concern is -- is we have
11:58:33 19 two expert declarations and I imagine that both DOJ and
11:58:38 20 the Plaintiff -- or the DACA Intervenorers, as well as
11:58:42 21 perhaps New Jersey, might include expert declarations in
11:58:45 22 their PI briefing as well and so I would just ask that
11:58:49 23 we have a similar opportunity to depose their experts in
11:58:54 24 such a way that they do ours.

11:58:55 25 THE COURT: Well, if someone has an expert,

11:58:57 1 I'll -- an -- an outside expert, I'm -- I'm granting
11:59:00 2 that. And even against the DOJ. If you guys get an
11:59:03 3 outside expert, then I'm going to let either side,
11:59:06 4 whoever wants to depose him, depose him.

11:59:08 5 MR. DISHER: Thank you, Your Honor. And --
11:59:09 6 and along those lines, given that discovery ends before
11:59:13 7 the briefing is due, we would request a deadline for all
11:59:18 8 parties to disclose potential experts that they might
11:59:21 9 include declarations for so we have a chance to depose
11:59:25 10 them before the -- the briefing is due and -- and before
11:59:28 11 the discovery period ends.

11:59:31 12 THE COURT: Okay. I'm -- I'm giving June
11:59:32 13 15th as that deadline.

11:59:34 14 MR. DISHER: Thank you, Your Honor.

11:59:40 15 THE COURT: Now, this is going to require
11:59:41 16 some coordination from everybody, so I'm -- I'm asking
11:59:46 17 y'all to work together and see what you can -- you know,
11:59:49 18 and you may be taking three depositions a day or
11:59:54 19 something some place.

11:59:55 20 Go ahead.

11:59:56 21 MS. PERALES: One more question. With
11:59:57 22 respect to the response brief that is due on June 8, may
12:00:02 23 that be something in the form of --

12:00:04 24 THE COURT: That's not -- that's not really
12:00:05 25 a brief. I'm -- that's more of a response to your

12:00:09 1 position on the actual -- you know, it's more like than
12:00:13 2 answer to their motion for preliminary injunction.

12:00:17 3 MS. PERALES: So could --

12:00:18 4 THE COURT: They have -- they have filed a
12:00:19 5 lawsuit and they filed a separate -- they filed a
12:00:22 6 complaint, they filed a separate motion for a
12:00:27 7 preliminary injunction. So what I'm thinking is that --
12:00:34 8 now, and you guys had filed -- I can't remember if you
12:00:36 9 filed an answer or not.

12:00:37 10 MS. PERALES: We did, Your Honor.

12:00:38 11 THE COURT: But have you filed a response to
12:00:39 12 their motion for preliminary injunction?

12:00:41 13 MS. PERALES: Not yet, Your Honor.

12:00:42 14 THE COURT: That's what I'm talking about.

12:00:44 15 MS. PERALES: Okay.

12:00:44 16 THE COURT: But -- but I'm con -- what I'm
12:00:45 17 thinking is that's going to be more like an answer type
12:00:49 18 document saying don't grant a summary judgment, we don't
12:00:53 19 like it. And then the actual briefing will be the brief
12:00:57 20 you file on July 7th.

12:00:59 21 MS. PERALES: Thank you, Your Honor. And --

12:01:01 22 THE COURT: It's going to be more of a
12:01:02 23 statement of position.

12:01:03 24 MS. PERALES: Yes, Your Honor.

12:01:04 25 THE COURT: Like a -- like a federal court

12:01:06 1 answer.

12:01:06 2 MS. PERALES: Thank you, Your Honor. And
12:01:08 3 then with respect to -- we think we can hopefully take
12:01:12 4 less depositions if we're allowed to propound some
12:01:15 5 written discovery. May we have written discovery on
12:01:19 6 a -- a 10 or a 15 day turn around?

12:01:22 7 THE COURT: Well, let's make it reasonable
12:01:25 8 written discovery. Let's don't have something that says
12:01:29 9 give me 10,000 documents because that's -- we
12:01:34 10 know that's going to be impossible to comply with. But
12:01:34 11 if you have like some reasonably succinct
12:01:38 12 interrogatories or something like that, that you can get
12:01:41 13 an answer for --

12:01:44 14 MS. PERALES: Thank you, Your Honor.

12:01:45 15 MR. DISHER: And, Your Honor, one last point
12:01:47 16 of clarification? On the June 15th deadline to disclose
12:01:50 17 experts, that will also include the bases for their
12:01:55 18 opinion and -- and a brief summary that's basically
12:01:57 19 either the declaration or a short report from the
12:01:59 20 expert?

12:01:59 21 THE COURT: Right.

12:02:04 22 MR. ROBINS: Your Honor, one last point for
12:02:07 23 federal Defendants, I believe. With regard to the
12:02:10 24 filing you contemplate that you've ordered on June 8th,
12:02:13 25 the federal Defendants are prepared to respond to the

12:02:16 1 preliminary injunction request but to the extent that a
12:02:20 2 formal answer to the complaint is due --

12:02:22 3 THE COURT: I'm not -- I wasn't counting
12:02:24 4 that.

12:02:24 5 MR. ROBINS: Very well, Your Honor. Should
12:02:26 6 we file by formal motion or request to extend that
12:02:29 7 response deadline out to after the conclusion of this
12:02:32 8 discovery and --

12:02:33 9 THE COURT: When is it due? I haven't
12:02:35 10 calculated it.

12:02:36 11 MR. ROBINS: I believe it would be in -- in
12:02:37 12 the first few days of July, Your Honor.

12:02:39 13 THE COURT: Okay. Well, I -- why don't you
12:02:40 14 go ahead and file it whenever it's due.

12:02:44 15 MR. ROBINS: Yes, Your Honor.

12:02:47 16 THE COURT: All right. Okay. I want to --
12:02:54 17 I'm going to take New Jersey's intervention under
12:02:58 18 advisement. I've -- I've denied Ms. Perales' motion to
12:03:02 19 dismiss but I've also denied that without prejudice to
12:03:06 20 re-assert it.

12:03:07 21 And but before y'all leave today, I want to
12:03:12 22 meet with all of y'all in chambers. So I'm -- I'm
12:03:19 23 adjourning the hearing but I want to meet with y'all.

24 (COURT IN RECESS.)

25

1 REPORTER'S CERTIFICATE

2
3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled
5 matter.
6

7
8 /s/Sheila E. Perales.

SHEILA E. PERALES, CSR RPR CRR

9 Exp. Date: Dec. 31, 2018
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